Kentucky General, Inc., d/b/a Norman King Electric *and* International Brotherhood of Electrical Workers, Local Union No. 1701, AFL–CIO. Cases 25–CA–25894–1 and 25–CA–25894–2

May 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 30, 2000, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below and substitute the attached notice.

ORDER

The National Labor Relations Board orders that the Respondent, Kentucky General, Inc., d/b/a Norman King Electric, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment or refusing to hire job applicants because they are, or are believed to be, members or sympathizers of the Union.

(b) Promulgating, maintaining, or enforcing a "no applications accepted" policy, or any other policy for the purpose of discouraging union activities.

(c) Promulgating, maintaining, or enforcing a policy of hiring, or considering for hire, only persons known by Norman King or referred to the Respondent by persons known by Norman King, or any other policy for the purpose of discouraging union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Timothy Blandford, David Cheek, David Carrico, and Nicholas Elder employment in positions for which they sought to apply, without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination.

(b) Make Timothy Blandford, David Cheek, David Carrico, and Nicholas Elder whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, rescind its policy of accepting applications for employment, considering applicants for employment, and hiring applicants for employment only if the applicant is known by Norman King or referred by persons known by Norman King.

(e) Remove the three posted signs stating "no applications accepted" from its facility, including any near the entrance to the Respondent's facility.

(f) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, and at all current jobsites, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 1997.

(g) Within 14 days after service by the Region, post three signs containing the following text from the notice marked "Appendix": "WE WILL ACCEPT APPLICATIONS FOR EMPLOYMENT, CONSIDER SUCH APPLICATIONS, AND HIRE APPLICANTS WITH-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

OUT REGARD TO THE APPLICANT'S UNION MEMBERSHIP OR SYMPATHIES." These signs shall be maintained for 60 consecutive days. The signs shall be posted in the same manner, and at the same locations, as the three "no applications accepted" signs that are to be removed pursuant to this Order, and the text on the new signs shall be of the same size type, and color as that which appeared on the "no applications accepted" signs.

(h) Within 60 days after service by the Region, publish, in a newspaper of general distribution in the Owensboro, Kentucky area, in regular size type, a copy of the entire notice marked "Appendix" for at least 2 days in each of 4 consecutive weeks.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants because they are, or are believed to be, members or sympathizers of a union.

WE WILL NOT promulgate, maintain, or enforce a "no applications accepted" policy, or any other policy for the purpose of discouraging union activities.

WE WILL NOT promulgate, maintain, or enforce a policy of hiring, or considering for hire only persons known by Norman King or referred to us by persons known by Norman King, or any other policy for the purposes of discouraging union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL accept applications for employment, consider such applications, and hire applicants without regard to the applicant's union membership or activities.

WE WILL, within 14 days of the date of the Board's Order, offer Timothy Blandford, David Cheek, David Carrico, and Nicholas Elder employment in positions for which they sought to apply without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination against them.

WE WILL make Timothy Blandford, David Cheek, David Carrico, and Nicholas Elder whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL, within 14 days of the date of the Board's Order, rescind our policy of accepting applications for employment, considering applicants for employment, and hiring applicants for employment only if the applicant is known by Norman King or referred by persons known by Norman King.

WE WILL remove the three posted signs stating "no applications accepted" from our facility, including any near the entrance to our facility.

WE WILL, within 14 days after service by the Region, post and maintain for 60 consecutive days, three signs stating "WE WILL ACCEPT APPLICATIONS FOR EMPLOYMENT, CONSIDER SUCH APPLICATIONS, AND HIRE APPLICANTS WITHOUT REGARD TO THE APPLICANT'S UNION MEMBERSHIP OR SYMPATHIES."

WE WILL, within 60 days after service by the Region, publish, in a newspaper of general distribution in the Owensboro, Kentucky area, in regular size type, a copy of the entire notice marked "Appendix" for at least 2 days in each of 4 consecutive weeks.

KENTUCKY GENERAL INC., D/B/A NORMAN KING ELECTRIC

Joseph P. Sbuttoni III, Esq., for the General Counsel.
James Smith, Esq. (Smith & Smith), of Louisville, Kentucky, for the Respondent.
Mr. Gary Osborne, of Owensboro, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Owensboro, Kentucky, on May 22, 2000. The two underlying charges were filed on March 4, 1998, by the International Brotherhood of Electrical Workers, Local Union No. 1701, AFL–CIO (the Union). The complaint was issued on February 10, 1999, and alleges that Kentucky General, Inc. d/b/a Norman King Electric (the Respondent) refused to hire, and consider for hire, four individuals because of their union and concerted activity, in violation of Section 8(a)(1) and Section 8(a)(3) of the Act. The complaint also alleges that the Respondent main-

tained a "no applications accepted" hiring policy in order to discourage union activity in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer in which it admitted that it posted a "no applications accepted" sign at its facility, but denied that the policy was maintained to discourage union activity. The Respondent also denied the other essential allegations of the complaint and raised various affirmative defenses, including that the allegation regarding the Respondent's hiring policy was time barred under Section 10(b) because that policy was in effect for more than 6 months prior to the filing of the charges.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is an electrical contractor with an office and place of business in Owensboro, Kentucky. In the course of its business operations during the 12-month period ending February 28, 1998, the Respondent purchased and received goods and/or services valued in excess of $50,000 at its Owensboro, Kentucky facility from other enterprises located within the Commonwealth of Kentucky, each of which other enterprises had purchased and received the goods and/or services directly from points outside the Commonwealth of Kentucky.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is an electrical contractor operating in Owensboro, Kentucky, and the surrounding areas. It performs most of its work in industrial plants, but also has projects in commercial and residential settings. Norman King is the Respondent's owner and president, and the only person with authority to hire employees for the Respondent. The Respondent generally employs from 15 to 18 persons as electricians, electrician's helpers, and laborers. It also employs three on-site supervisors, estimators, a secretary, and the owner's wife—Doretha King—as office manager. The Respondent's electrical workers were represented by a union until 1987, but have not been represented by a union since that time.

In June 1994, the Respondent obtained a contract to perform electrical work for Ragu Foods. As a result, the Respondent needed to hire a substantial number of new employees. To meet that need the Respondent placed a help-wanted advertisement in one or more local newspapers for a period of approximately 3 weeks beginning in early August 1994. This advertisement did not give the name, address, or location of the Respondent, but rather indicated that applicants should mail their responses to a post office box.[1] The Respondent hired a number of new employees, but received more applications than it required.

The Respondent's actions surrounding the hiring for the Ragu Foods project were the subject of an unfair labor practices charge filed by the Union on August 18, 1994. On April 7, 1997, Administrative Law Judge Richard Beddow issued a decision, based on the charge of August 18 and other charges, in which he concluded that the Respondent had committed numerous unfair labor practices. *Norman King Electric*, supra. In his decision, which was affirmed by the Board and enforced by the United States Court of Appeals for the Sixth Circuit, *Kentucky General, Inc. v. NLRB*, 177 F.3d 430 (6th cir. 1999) (GC Exh. 3), Judge Beddow held that the Respondent had violated Section 8(a)(3) of the Act by screening job applicants to identify union sympathizers, refusing to consider suspected union sympathizers for employment, and discriminatorily laying off employees because they engaged in union or protected activities. 324 NLRB at 1087. Judge Beddow also held that King had violated Section 8(a)(1) by interrogating an employee about his intentions regarding union activity, admonishing an employee not to involve the Respondent in a union campaign, and telling a new employee that the Respondent had problems with the Union and that he hoped the employee would not be a union man. Id. Among Judge Beddow's findings of fact was that King had told one employee there was "no way" the Union could get him to sign a contract since "all he had to do was go to negotiations four times in a 1-year period" and "make impossible demands that the Union could not meet." Id. at 1080–1081.

In affirming Judge Beddow's decision, the Board observed that while King claimed to have selected nonunion employees because of his familiarity with their skills and abilities, those employees had not previously worked with, or for, King, and

[1] For reasons discussed later in this decision, the question of whether the advertisement provided the name, address, or location of the Respondent is relevant to the issue of whether the Respondent had a lawful motive for posting the "no applications accepted" signs. The text of the advertisement, as quoted in the decision in a prior case against the Respondent, read as follows:

> ELECTRICIAN & helpers for industrial work. Experienced in controls & installing conduit.
> P.O. Box 1306, Owensboro, KY 42302

GC Exh. 2, p. 5; *Norman King Electric*, 324 NLRB 1077, 1081 (1997). During the trial in the instant case, King first testified that the advertisement "might have" directed that applications be submitted to a post office box, but that he thought it also gave his telephone number. (Tr. 322.) Subsequently he testified, with apparent certainty, that the advertisement asked that applications be sent to a post office box, but he then testified, evasively I believe, that there were possibly other versions of the advertisement and that he could not remember whether those other versions stated the Respondent's name or address. (Tr. 329.) As noted above, the findings in the prior decision include the text of the advertisement, which shows that it gave a post office box, but not the name, address, location, or phone number of the Respondent. Based on the evidence, as well as King's evasiveness and demeanor when testifying about the advertisements, I conclude that the help-wanted advertisements that the Respondent published in 1994 did not state the Respondent's name, address, location, or phone number.

that King "testified only in generalities" concerning his "asserted knowledge of their skills." Id. at 1077. The Board pointedly observed that while King asked current employees to refer electricians for possible hire, he only pursued those referrals when the persons referred were nonunion electricians. Id. Among the persons found to have been discriminatorily denied employment in the prior case was Timothy Blandford, an electrician and union member, who is also one of the alleged discriminatees in this case. The order in the prior case directed the Respondent to, inter alia, offer Blandford employment within 14 days.[2]

In late 1994 or early 1995, in the wake of the August 18 unfair labor practices charge, the Respondent posted three signs at its facility.[3] One of these read "No Applications Accepted AUTHORIZED PERSONNEL ONLY" and was placed at the Respondent's front gait. A second was placed on the door to the Respondent's office and read "No Applications Accepted." A third sign also read "No Applications Accepted," and was posted on or near the exterior of the office. King testified that the signs were put in place for the purpose of stemming the disruptive flow of walk in applicants generated by the newspaper advertisements. However, as noted above, the advertisements did not give the Respondent's name, address, or location, and thus it is unclear how large numbers of applicants would have found their way to the Respondent's door based on the advertisements.

Subsequently, in October 1997, the Respondent obtained a new contract to perform electrical work for the Kimberly Clark Paper Corporation (Kimberly Clark). Gary Osborne, the president of the Union, found out about the Kimberly Clark project, and suspected that the Respondent would need to hire additional electricians to meet the demands of the job. Osborne contacted Blandford, who as discussed above, the Respondent has been directed to hire by the order in a prior case. The Respondent had not offered Blandford employment on the Kimberly Clark project, or any other project, and so Blandford visited the Respondent's office on October 27, 1997, to ask if his prior application was still on file and to apply for work. Accompanying Blandford were four other union electricians who also wished to apply for work with the Respondent. These employees were David Carrico, David Cheek, Nick Elder, and Richard Fry. Each of the five union electricians was wearing one or more union insignias.

When Blandford entered the Respondent's office he was met by Doretha King (Norman King's wife and the Respondent's office manager). Also present in the office was Sharron Berry (secretary/office worker). Blandford approached to within a few feet of the desk where D. King was located and the other alleged discriminatees gathered to the side and back of Blandford. Then Blandford, referring to the "no applications accepted" sign on the door, said, "I see that you are not accepting applications." D. King responded, "[n]o we're not." Then Blandford asked whether his prior application was still on file. D. King asked when the application was submitted, and when Blandford told her he had filed it about a year and a half earlier, D. King said that it was probably still on file.[4] D. King asked for Blandford's name, which he told her, and then all five of the union electricians left the Respondent's premises. At no point during the encounter with D. King did Carrico, Cheek, Elder, or Fry speak. Nor did any of the union electricians, including Blandford, expressly ask to fill out an application. Cheek testified that no such request was made because it would have been futile after D. King confirmed to Blandford that the Respondent was not accepting applications. Indeed, King and his wife both stated that had any of five union electricians asked for an application on October 27, their request would have been denied. During the encounter no one asked the electricians whether they were members of the Union or commented on the union insignias they were wearing. The Respondent never contacted Blandford about his "on file" application and the "no applications accepted" signs continued to be posted at the Respondent's facility.

During the same timeframe that the union electricians were informed that no applications were being accepted, the Respondent hired at least seven persons. Joel Cornelius, a nonunion electrical worker, was hired by the Respondent earlier in October 1997 and assigned to work as an electrician/electrician's helper[5] on the Kimberly Clark project. To the best of Joel's[6] recollection, he went to the Respondent's office in October 1997, obtained an application from a secretary, filled out the application, and then talked to King, who hired him. Joel had previously worked for the Respondent for 6 months in 1996 as an electrician's helper after being laid off by May Electric Company, a nonunion contractor. No one associated with the Respondent questioned Joel about union matters prior to when King hired him.

Within a week or two of beginning work with the Respondent in October 1997, Joel Cornelius told his brother, Robin, that the Respondent needed workers. Robin went to the Respondent's facility and requested an application from one of the

[2] Timothy Blandford was one of six discriminatees that the Board ordered the Respondent to hire and make whole in the prior decision discussed above. That order was enforced by the United States Court of Appeals for the Sixth Circuit on February 18, 1999. However, as of the time of trial in this case—May 22, 2000, the Respondent had not hired, or provided make-whole relief, to Blandford or any of the other discriminatees.

[3] Norman King, Doretha King (his wife), and Sharron Jovon Berry (an office worker) all testified that the signs were posted "in late 1994 or early 1995," but none of the Respondent's witnesses gave more specific testimony regarding when the signs were posted. I conclude that August 18, 1994—the date the charge was filed—is prior to the period that would be encompassed by the plain meaning of "late 1994 or early 1995."

[4] N. King testified that, in fact, applications were usually only considered for about 30 days after submission.

[5] Joel Cornelius stated that sometimes he was the electrician, and sometimes he was the electrician's helper, depending on the work involved.

[6] In the cases of Joel Cornelius and his brother, Robin Cornelius, I have deviated from the practice of referring to individuals by their last names, in order to avoid confusion.

women in the office—apparently either D. King or S. Berry.[7] She gave Robin an application, which he completed and returned to her. Robin waited in the office until he met with Norman King. The two discussed, among other things, the fact that Robin's father was an acquaintance of King's, and that Robin's brother, Joel, was working for the Respondent. King also knew that Robin had worked for May Electric, a nonunion contractor, for a number of years. Robin was hired as an electrician the same day that he applied and was assigned to work on the Kimberly Clark project. Joel Cornelius did not talk to King about Robin prior to Robin's beginning work with the Respondent, and King had not invited Robin to apply prior to when the Respondent's staff provided an application to Robin and accepted the completed application back from him.[8] Robin was not a union member when he worked for the Respondent in 1997.[9] Neither King nor anyone else associated with the Respondent asked Robin about the Union prior to hiring him. Robin worked for the Respondent for approximately 3 months and then accepted a better-paying position with another employer.

The Respondent hired at least five other individuals in October and November 1997. One of those hired—John Shields—is King's godson. Two others—Gary Stanley and Jeremy Stanley—are King's neighbors. According to King, Gary Stanley, in turn recommended a forth hire—Samuel Girten. A fifth hire—Brian Howard—was, according to King, a friend of one of the Respondent's secretaries and was recommended by her. These individuals were hired as helpers and laborers.

On December 16, 1997, Osborne mailed a certified letter to the Respondent stating that five members of the Union had tried to apply for electrician or helper positions, but that they had been told that the Respondent was not accepting applications. The letter stated that despite the fact that these union applicants were turned away, it was clear that the Respondent had hired additional manpower, and that the five union members were willing to work under the same terms and conditions as the Respondent's current employees. In addition, Osborne asked what the Respondent's "current hiring procedure" was. The Respondent never replied to Osborne's letter.

The Respondent has no written hiring policy. King testified that under his unwritten policy, the Respondent does not accept applications from persons unless King knows them, or they have been recommended by persons King knows, and King has decided to hire them. According to King, this has been his practice since some point in 1994 or 1995. He stated that when he needs to hire, his first choice is to select someone he knows personally, or who has worked for him and done a good job in the past. His second choice is to select someone recommended by one of his employees. He also considers persons recommended by friends and neighbors. Sometimes King considers hiring persons referred by clients or by general contractors that King works with. King testified that his hiring policy is motivated largely by concerns about safety and potential liability for untimely or improperly performed work.

B. The Complaint Allegations

The complaint in this case alleges that the Respondent violated Section 8(a)(1) and Section 8(a)(3) of the Act by refusing to hire and to consider for employment applicants Tim Blandford, David Carrico, David Cheek, and Nicholas Elder because of their union and concerted activities.[10] The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining a "no applications accepted" hiring policy with the purpose of discouraging its employees and applicants for employment from forming, joining, and assisting the Union or engaging in other concerted activities.

III. ANALYSIS AND DISCUSSION

A. Refusal to Hire

In order to establish discriminatory refusal to hire in violation of the Act, the General Counsel must first show: "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants." *FES,* 331 NLRB 9, 10 (2000). If the General Counsel succeeds in making these showings the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id.

The General Counsel has succeeded in showing that the Respondent was hiring at the time that the four alleged discriminatees were turned away on October 27, 1997. Within a period of 30 days before and 30 days after that date, the Respondent hired at least seven individuals—Joel Cornelius, Robin Cornelius, John Shields, Gary Stanley, Jeremy Stanley, Samuel Girten, and Brian Howard—as electricians, helpers, or laborers. Five of these individuals were hired during the 30-day period after the four alleged discriminatees were turned away. Therefore, the General Counsel has met the first

[7] Since the Respondent employs one office manager and one secretary, I conclude that the woman who met Robin was either D. King (office manager) or S. Berry (secretary).

[8] King testified that Joel Cornelius recommended that he hire Robin Cornelius. However, this testimony was directly contradicted by Joel Cornelius, who testified that he had never discussed Robin with King prior to when Robin was hired. I found Joel a very credible witness, and a more credible one than King. Joel is not a member of the Union and apparently had nothing to gain through his testimony in this case. By all accounts he had a successful and amicable employment relationship with the Respondent and no basis for bias was shown. Based on these factors, as well as Cornelius' demeanor, and his straightforward and open manner, I credit his testimony. On the other hand I found King to be somewhat vague and evasive regarding this and other matters, see, e.g., supra at fn. 1. I credit Joel Cornelius' testimony that he did not recommend that the Respondent hire Robin Cornelius, and discredit King's contrary testimony.

[9] Robin Cornelius has since joined the Union.

[10] As originally filed, the complaint alleged that five individuals were unlawfully denied employment and consideration for employment. At trial, I granted the General Counsel's unopposed motion to amend the complaint to delete the allegations regarding one of those individuals—Richard Fry.

fore, the General Counsel has met the first requirement of its initial burden.

The General Counsel's next burden is to show that the alleged discriminatees possessed relevant experience or training. This burden "is limited to showing that the applicants met the employer's *publicly announced or generally known requirements of the position*, to the extent that these facial requirements are based on nondiscriminatory, objective and quantifiable employment criteria." *FES*, supra at 10 (emphasis added). In the instant case, the Respondent did not "publicly announce" or make "generally known" any requirements for the positions it was filling. Indeed, the Respondent had posted misleading signs indicating that no applications were being accepted. Since the Respondent did not state what the requirements of the positions were, it is unclear whether the General Counsel need make any showing at all to satisfy this element of the initial burden. That being said, the evidence does establish that the alleged discriminatees have experience and training relevant to the requirements of the positions. Each of the alleged discriminatees in this case has extensive experience in the electrical field: Blandford has been a journeyman electrician since 1983; Carrico has been a journeyman wireman since 1983; Elder has been a journeyman electrician for 13 years; and Cheek has been a journeyman wireman with the Union for 5 to 6 years and has 30 years of experience in the electrical field. The experience of these alleged discriminatees is clearly relevant to electrician, helper, and laborer jobs with the Respondent's electrical contracting business. The electrical-work experience of the alleged discriminatees was similar to, but generally more extensive than, that of either of the Cornelius brothers, and significantly more extensive than that of the other five individuals who were hired by the Respondent in October and November 1997.

Although the Respondent did not "publicly announce" or make "generally known" any requirements of the positions for which it was secretly hiring, King did testify that before he hires someone he determines if the individual is "qualified for what they're doing." (Tr. 257.) King did not put "qualified" into objective and quantifiable terms, stating that there is "no particular amount" of experience that he requires of potential employees (Tr. 27). King also indicated that he is more interested in whether a prospective applicant is an honest, safe, good worker, than he is in the candidate's prior experience and training. Id. (Tr. 240–242.) Under the Board's recent decision in *Thermo Power*, if the employer's stated qualifications for a position are subjective or ambiguous, then the General Counsel does not have to show that the applicant met those qualifications; rather "the burden is on the employer to show that the applicant failed to meet these imprecise qualifications," Id. The Respondent introduced no evidence showing that any of the alleged discriminatees lacked experience and training that was relevant to the subjective and unquantified qualifications of the positions at issue. To the contrary, as noted above, the evidence indicates that the alleged discriminatees had experience and training that was comparable or superior to that of the persons hired by the Respondent in October and November 1997. Nor did the Respondent introduce any evidence tending to show that even a single one of the alleged discriminatees was not honest, safe, or a good worker. Indeed, although King testified that safety is a major concern for him in hiring, he conceded that his applications do not ask the candidate for any information about his or her prior safety record. Moreover, King testified only in generalities about the qualifications of most of the persons he did hire in October and November 1997. The Respondent has clearly failed to carry its burden with respect to these subjective and imprecise criteria. I conclude that the General Counsel has shown that the alleged discriminatees had experience and training relevant to the requirements of the positions for which the Respondent was hiring

The General Counsel has also succeeded in meeting the third element of its initial burden, having shown that "antiunion animus contributed to the decision not to hire the applicants." *FES*, supra at 10. I begin by noting that each of the four alleged discriminatees testified that he was wearing one or more items identifying him as a member of the Union when he visited the Respondent's office on October 27. I found this testimony credible based on the specificity of each of the alleged discriminatee's recollection regarding the identifying item, or items, he was wearing, as well as on the clear and forthright demeanor of the alleged discriminatees while testifying regarding this subject. I do not credit the testimony of Sharron Berry that none of the alleged discriminatees was wearing a union insignia. I base this determination in part on contradictions in her testimony; she stated, on the one hand, that she observed that none of the alleged discriminatees was wearing a union insignia, and, on the other hand, that she did not have a clear view of any of them besides Blandford. (Cf. Tr. 210– 211.) I also base my credibility determination on Berry's demeanor and manner, which seemed rehearsed rather than forthright. In addition, I do not credit the testimony of D. King that she "didn't really look at what [the alleged discriminatees] had on," and did not observe the union insignias they were wearing. (Tr. 221–222.) Given that each of the four alleged discriminatees was wearing one or more such insignias, and that they approached quite near to D. King, it is implausible that D. King would not have noticed the union insignias. I conclude that D. King was aware that the alleged discriminatees were members of the Union at the time she turned them away. The fact that D. King denied any awareness that the individuals were union members under these circumstances smacks of an effort to "cover up" the Respondent's actions, and this tends to support the conclusion that antiunion animus played a part in the decision to turn the union electricians away.

In finding antiunion animus I am also persuaded by the background provided by the prior Board decision, which held that the Respondent committed multiple unfair labor practices against the same union involved here. Those unfair labor practices included screening applicants to exclude union sympathizers and laying off employees in retaliation for their union activity. I may rely on the findings and evidence in the earlier case against the same employer as background in this case. See, e.g., *Stark Electric*, 327 NLRB 518 at fn. 2 (1999). I find this background particularly telling here because it was shortly after the Union filed the its charge in the prior case that the employer first posted the "no applications accepted" signs. For reasons discussed more fully below, the timing of the employer's posting of the signs, in combination with the other

evidence in this case, leads me to conclude that the Respondent's adoption of its so-called "no applications accepted" policy, and its rejection of the alleged discriminatees, were a continuation, in more subtle form, of the same antiunion screening that the Respondent was found to have committed in the prior case.

I also conclude that antiunion animus is shown by the Respondent's disparate application of its hiring policy. As has been discussed above, the Respondent claims that it does not accept applications from individuals who "walk-in," but only from persons who King knows personally, or who are recommended to King by persons he knows. When the alleged discriminatees arrived at the Respondent's location wearing union insignias they were informed that the Respondent was not accepting applications, ostensibly pursuant to this policy. However, Robin Cornelius, a nonunion member, went to the Respondent's office during the same time period and was given an application when he requested one, although he had not yet spoken to King. That application was accepted from Robin, and then Robin spoke to King, who hired him the same day. At the time he received and submitted the application, Robin Cornelius had never worked for the Respondent, and King did not claim to have first-hand knowledge of his abilities. Perhaps more importantly, although both D. King and S. Berry testified, neither claimed that they remembered that they gave Robin Cornelius an application only because they believed that Robin was known by Norman King, or recommended by someone known to Norman King.

King stated that Robin's brother, Joel Cornelius, recommended Robin, but this assertion was directly contradicted by Joel's very credible testimony that he never talked to King about Robin's application prior to when the Robin was hired. Robin Cornelius' father is a nonunion electrical contractor and an acquaintance of King's, but the Respondent has not claimed that Robin's father communicated with King regarding Robin's application. In addition, King testified only in the most general terms regarding the experience he believed Robin gained from his father. In any case, regardless of what King knew at the time he made the final hiring decision, I believe that Robin was treated differently than the union applicants at the initial steps of the hiring process when he was given an application by office staff and permitted to submit that application once completed. I conclude that the application was accepted from Robin Cornelius in contravention of the Respondent's alleged, unwritten, hiring policy, of only accepting applications from persons who King knew personally, or who had been recommended by persons King knew. Robin was simply a "walk-in" applicant at the time when he was permitted to submit his application.

The Respondent hired Robin's brother, Joel Cornelius, on two occasions—once in 1996 and again in October 1997. The Respondent has not alleged that, prior to the 1996 hiring, King knew Joel personally or that King had firsthand knowledge of Joel's abilities. As in Robin's case, the Respondent has not asserted that the brothers' father communicated with King about Joel's application. At the time of his second hiring, in October 1997, Joel's recollection is that he simply went into the Respondent's office, requested an application, and was given one.[11] At the time of the second application, Joel Cornelius was known to King, since he had worked for the Respondent previously, but the Respondent has not shown that the office personnel who gave Joel the application were aware of this when they dispensed the application and accepted the completed application back. I conclude that Joel Cornelius was hired on both occasions in contravention of the Respondent's alleged, unwritten, hiring policy. The fact that the Respondent withheld applications from individuals who were identified as union members pursuant to its so-called "no applications accepted" policy, but did not enforce the same policy to withhold applications from the Cornelius brothers, neither of whom were union members at the time they applied, leads me to conclude that the hiring policy was disparately applied based on the known or believed union sympathies of the prospective applicants. This disparate treatment is another basis for concluding that antiunion animus played a part in the decision not to hire the alleged discriminatees. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1031 (1996); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996); see also *Eddlyleon Chocolate Co.*, 301 NLRB 887, 889 (1991) (departure from established procedures evidence of animus).

Since the General Counsel has met its burden regarding the three elements described in *Thermo Power*, supra, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. The Respondent appears to make essentially two arguments. First, the Respondent contends that the discriminatees never specifically asked for applications, and never tried to leave an application or resume, and that since none of them applied, the Respondent would not have hired them even in the absence of discrimination. Second, the Respondent argues that the alleged discriminatees were turned away because they did not meet the Respondent's threshold requirements—presumably that of being known to King, or recommended by someone known to King. For the reasons discussed below neither argument withstands scrutiny.

Regarding the first argument, decisions by the Board make clear than an individual is not required to file an application in order to perfect a hiring claim if such filing would be a "futile act." *Plumbers Local 572 (MK-Ferguson)*, 297 NLRB 691, 695 (1990); *Atlantic Interstate Messengers,* 274 NLRB 1144, 1151 (1985); *Joseph Magnin Co.,* 257 NLRB 656, 666 (1981), enfd. 704 F.2d 1457 (9th Cir. 1983), cert. denied 465 U.S. 1012 (1984); *A. J. Librera Disposal Service,* 247 NLRB 829, 833 (1980). In this case it would have been futile for the alleged discriminatees to ask to apply since D. King had already told

[11] Joel Cornelius testified that when he applied for employment with the Respondent in October 1997, he obtained an application from one of the secretaries in the office and then talked to King who offered him work. However, Cornelius conceded that while this was his recollection, he was not "positive" that he was given an application prior to meeting with King. (Tr. 58–59, 65.) I believe that the evidence indicates that the incident more likely than not occurred as the witness recalled it did. His recollection of what occurred in his case is similar to his brother Robin's experience when Robin applied a week or two later.

Blandford that the Respondent was not accepting applications. Indeed, as indicated by the testimony of David Cheek, the reason the applicants did not ask to submit applications is that doing so would have been futile after D. King told Blandford that the Respondent was not accepting applications. Although the Respondent argues that the individuals cannot be discriminatees because they did not ask to submit applications, both Norman King and his wife conceded that none of the alleged discriminatees would have been allowed to submit an application even if they had explicitly asked to do so.[12]

The Respondent also argues that the alleged discriminatees did not meet its "threshold requirements," i.e., of being known or referred. (R. Br. 32.) Such requirements are facially neutral, and, if applied evenhandedly to union and nonunion applicants, can be lawful. On the other hand, the Board's decision in *Thermo Power* makes clear that even facially neutral criteria are unlawful if the "the requirements were, themselves pretextual or were applied as a pretext for discrimination." *FES*, supra at 10. In this case, I conclude that the General Counsel has made that showing by introducing credible evidence that the policy was applied to exclude the union applicants, but was waived in the case of nonunion applicants such as Robin Cornelius and Joel Cornelius. Although this would, standing alone, be sufficient to lead me to conclude that the Respondent's "threshold requirements" were pretextual, I was also persuaded by the fact that the policy was unwritten and conveniently vague,[13] and also by the circumstances, discussed below, that surrounded the policy's adoption.[14]

[12] The Respondent also contends that it turned away the applicants without even considering them for employment and that "[a]s a matter of law and logic, there can be no discriminatory decision not to hire when there was no decision at all." (R. Br. 31.) This argument is overly facile. The Respondent *did* make a decision not to hire the alleged discriminatees, it simply made this decision based on criteria that were applied before the individuals were even permitted to submit applications. The Respondent itself asserts that it applied criteria—i.e., that only persons who were announced, identified, or known, would be allowed to submit an application, R. Br. 32—and this indicates that a decision about hiring was made. As with many employers, the Respondent's decision whether to hire a prospective employee is a process, not a single step. If the employer rejects an applicant for discriminatory reasons at any decisional step in the hiring process, such action can give rise to a refusal-to-hire violation.

[13] On the signs posted to the public, the Respondent's policy was "no applications accepted." However, King testified that the policy was that applications *were* accepted as long as he knew you, or knew someone who recommended you, and had decided to hire you. (Tr. 270–275.) A third formulation of the policy is stated in the Respondent's brief, which indicates that applications were not accepted from "unannounced, unidentified and unknown members of the general public." (R. Br. 32.) This indicates that the Respondent would accept applications not only from candidates who were known to King, or recommended by persons known to King, but also from persons who were "announced" or "identified." I conclude that the Respondent's policy is vague and changeable.

[14] I do not consider the Respondent's "threshold criteria" of being "known or referred" to relate to "experience or training" under the second element of the General Counsel's initial burden. However, I would reach the same result if I considered those criteria in the context of the General Counsel's initial showing, since the General Counsel has established that the criteria were applied disparately and pretextually.

B. Refusal to Consider

To establish discriminatory refusal to consider, the General Counsel bears the burden of showing: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. *FES*, supra at 11. I believe that, under *Thermo Power*, the requirements for establishing a refusal-to-consider violation differ from those for a refusal-to-hire violation primarily in terms of what is *not* required to establish the former. Specifically, to establish refusal to consider the General Counsel need not show either that there were openings at the time the alleged discriminatees applied or that the alleged discriminatees had relevant experience and training. For the same reasons discussed in the analysis of the refusal-to-hire claim, I conclude that the evidence in this case shows both that the alleged discriminatees were denied further consideration in the hiring process, and that antiunion animus played a part in the decision to deny the individuals that consideration. Therefore, I find that the Respondent violated the Act by discriminatorily denying the union electricians consideration for hiring.

C. Claim that "No Applications Accepted" Policy was Unlawfully Maintained

1. Timeliness of the charge

The Respondent asserts, as an affirmative defense, that the complaint allegation regarding maintenance of the "no applications accepted" policy is untimely because the unfair labor practices charge was filed more than 6 months after the adoption of that facially neutral policy. Section 10(b) of the Act states that, "no complaint shall issue based on an unfair labor practice occurring more than six months prior to the filing of the charges." It is well established that the 6-month period commences only when a party has clear and unequivocal notice of the violation of the Act. *Dynatron/Bondo Corp.*, 324 NLRB 572, 573 (1997), enfd. 176 F.3d 1310 (11th Cir. 1999). The party raising the affirmative defense based on Section 10(b) has the burden of showing clear and unequivocal notice of the violation of the Act. Id. The Respondent has not met that burden here.

The Union filed its charges in this case on March 4, 1998, and therefore any acts prior to September 4, 1997, are beyond the 6-month period applicable under Section 10(b). The "no applications accepted" signs were posted in late 1994 or early 1995, well over 6 months before the Union filed its charges. The Respondent points out, moreover, that Osborne, the Union's president, testified that several years before the relevant charges were filed he had heard King state that the "no applications accepted" signs had been posted.[15] The Respondent's

[15] Osborne stated that he remembered King testifying in 1994 that the Respondent had posted the "no applications accepted" signs. However, the hearing in the prior case, discussed above, against this Respondent was held in December 1996. It is not clear whether Osborne was referring to the hearing in December 1996, and became confused about dates, or whether he was referring to another hearing, the nature

argument based on Section 10(b) fails, however, because neither the Respondent's signs, nor what Osborne was told about those signs prior to September 4, 1997, provided clear and unequivocal notice of the Respondent's policy. Although Osborne had heard King refer to the "no applications accepted" signs, Osborne understood the signs to mean that applications would not be accepted when the Respondent was not in a "hiring mode," and that "as manpower was needed, [the Respondent] would accept applications." (Tr. 95.) Indeed, the Respondent has not introduced any evidence showing that, prior to September 4, 1997, the Union had notice that the Respondent would not accept applications from the general public, including union members, even when it was hiring. I consider Osborne's interpretation of the very minimal information that the Respondent disclosed regarding its unwritten and vague hiring policy to have been a fair interpretation. Since the reasonable understanding that Osborne arrived at was an inaccurate understanding—and inaccurate in significant ways[16]—I conclude that the Union did not have "clear and unequivocal" notice of the violation. See *Leach Corp.*, 312 NLRB 990, 991–992 (1993) (Sec. 10(b) found not to be a bar when the union had some information relating to the violation outside the 6-month period, but did not have clear and unequivocal notice of the facts giving rise to the violation until a date within the 6-month period), enfd. 54 F.3d 802 (D.C. Cir. 1995).

Not only did the posted signs fail to give "clear and unequivocal" notice of the facts giving rise to the alleged violation, but the signs were actually misleading about those facts. The signs stated, "no applications accepted," but King testified that applications actually *were* being accepted from persons whom he knew, or who had been recommended to him. Thus the policy, even as it was described by King, was not really "no applications accepted," but rather "no applications accepted, unless Norman King knows you, or you have been recommended by someone Norman King knows." There is no record evidence that the Respondent gave the Union clear and unequivocal notice of *that* policy. Indeed, the record suggests that the Respondent kept its unwritten and vague hiring policy a secret from the Union. Not only were the signs presented to the public misleading, but when Blandford asked D. King whether it was true that the Respondent was not accepting applications she said simply, "that's right." She did not explain to Blandford that the Respondent *was* accepting applications, but only if Norman King knew you, or you were referred by someone Norman King knew. Likewise, the Respondent never replied to the Union's letter asking the Respondent to describe its "current hiring procedures." Under these circumstances I conclude that King's mention, in Osborne's presence, of the "no applications accepted" signs cannot fairly be said to have provided the Union with clear and unequivocal notice of its actual "no applications accepted" hiring policy or of the violation of the Act.

Even assuming that the Union had been given notice of the Respondent's alleged unwritten hiring policy more than 6 months prior to when the Union filed its charges on March 4, 1998, the complaint allegation regarding the unlawful maintenance of that policy would not be time barred since the policy was applied in a discriminatory fashion within the 6-month period. *Jennie-O Foods*, 301 NLRB 305, 312–316 (1991). As discussed above, I find that the policy was applied in a discriminatory fashion—union applicants (Blandford, Cheek, Carrico, and Elder) were turned away pursuant to the policy, but nonunion applicants (Robin Cornelius and Joel Cornelius) were permitted to submit applications in contravention of the policy. This is another basis for rejecting the Respondent's argument that the complaint allegation regarding maintenance of the "no applications accepted" policy is time barred.

2. The Respondent's hiring policy

On its face, the Respondent's "no applications accepted" policy applies to union and nonunion persons alike and therefore appears not to discriminate against union electricians. However, the Board has long held that even a facially neutral, and otherwise lawful, policy violates the Act if it is either discriminatorily applied, *ITT Industries,*331 NLRB 4 (2000); *Dico Tire, Inc.*, 330 NLRB 1252 (2000); *Jennie-O Foods,* 301 NLRB at 316, or adopted to interfere with the union or protected activities, *Cannondale Corp.*, 310 NLRB 845, 849 (1993).

As discussed above, the evidence in this case shows that the Respondent did not apply its "no applications accepted" policy in an evenhanded manner. Because the Respondent's facially neutral hiring policy was applied in a disparate and discriminatory manner against union members, that policy violates the Act.

The evidence also leaves little doubt that the policy was adopted and maintained to interfere with union and protected activities. This is supported by the timing of the posting of the "no applications accepted" signs, as well as by the deceptive nature of those signs. The Respondent first posted the signs stating that applications would not be accepted in late 1994 or early 1995, shortly after the Respondent received applications from a number of union sympathizers, and after the Respondent's actions with respect to those applicants led to the filing of an unfair labor practices charge. That charge, in turn, resulted in a Board decision, enforced by the U.S. Court of Appeals for the Sixth Circuit, ruling that the Respondent had committed multiple unfair labor practices, including, screening potential applicants to exclude suspected union sympathizers. The fact that the signs were not posted until shortly after the Respondent received applications from a number of union sympathizers, and the Union initiated its challenge to the Respondent's practice of screening out such applicants, suggests

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of which is not revealed by the record in this case. In either case, Osborne was informed about the presence of the signs more than 6 months prior to when the charge in this case was filed.

[16] An employer's policy of not accepting applications from the general public, but accepting applications from persons known to, or referred by persons known to, the employer is not necessarily improper, but can provide a ready mechanism for screening union sympathizers out of the hiring process. On the other hand, a policy of not accepting applications from anyone when no hiring is taking place, but accepting applications from both the general public and persons known to the employer when hiring is taking place, is more open and provides less of an opportunity to screen out union sympathizers.

to me that the purpose of the signs was to initiate a less obvious screening effort.

The Respondent's institution of a "no applications accepted" hiring procedure that relied heavily on referrals is especially suspect in light of how the Respondent has used referrals in the past. In the prior decision, the Board observed that while King asked current employees to refer electricians for possible hire, he only pursued those referrals when the persons referred were nonunion members. Although a hiring procedure that relies heavily on referrals may be lawful if applied in a nondiscriminatory fashion, the prior decision provides a basis for suspecting that the Respondent's move to a largely referral-based system was not innocent. This suspicion is confirmed by the evidence, in this case, that the referral requirement was applied in a discriminatory manner to turn away union electricians, but not nonunion electricians.

It is also significant that the message on the signs, as discussed above, did not accurately describe the Respondent's hiring policy. That message gave the impression that no one was being permitted to apply for work with the Respondent at times when the Respondent was, in fact, accepting applications and hiring workers. The fact that, shortly after having problems with union sympathizers and the unfair labor practices charge, the Respondent made its hiring procedures a secret from the public also supports the view that the Respondent's motivation was to exclude union sympathizers from the applicant pool.

The Respondent denies that the signs were posted to screen out union applicants, and contends that they were posted, rather, to stem the disruptive flood of walk in applicants that was being generated by a help-wanted advertisement. However, that advertisement asked that applications be sent to a post office box, and did not give the name, address, or location of the Respondent. Therefore, the Respondent's contention that the newspaper advertisement created a flood of walk in applicants is implausible. Moreover, the advertisement ran in August 1994, 324 NLRB at 1081, and the Respondent's witnesses all testified that the signs were posted as late as the beginning of 1995. It is wholly incredible to me that the flood of walk-in traffic supposedly attributable to the advertisement would persist for months after the advertisement ceased to run. I reject the Respondent's explanation for the timing of its promulgation of the so-called "no applications accepted" policy. The fact that the Respondent has proffered such a transparently false rationale also suggests that the true explanation is improper.

I conclude that the Respondent violated Section 8(a)(1) of the Act by maintaining a hiring policy designed, and disparately enforced, to discourage its employees and applicants for employment from forming, joining, and assisting the Union or engaging in other concerted activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and Section 8(a)(3) of the Act by refusing to hire, and to consider for hire, employment applicants Tim Blandford, David Carrico, David Cheek, and Nicholas Elder.

4. The Respondent has violated Section 8(a)(1) of the Act by maintaining a hiring policy designed, and disparately enforced, to discourage its employees and applicants for employment from forming, joining, and assisting the Union or engaging in other concerted activities.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that the Respondent be ordered to offer Timothy Blandford, David Cheek, David Carrico, and Nicholas Elder employment in the positions to which they sought to apply without prejudice to their seniority or other rights or privileges they would have enjoyed had they been hired, and make them whole for any loss they have suffered as a result of Respondent's refusal to hire and to consider them for hire in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[17]

Furthermore, I will recommend that that the Respondent be ordered to remove all three of its posted "no applications accepted" signs and rescind its discriminatorily enforced and unlawfully motivated policy of refusing to accept applications from the general public.

In addition to the posting of a notice at the Respondent's facility in Owensboro, Kentucky, and at all current jobsites, I conclude that it is necessary that notice be provided to union sympathizers in the general public in order to dissipate the lingering effects of the unlawful hiring policy and "no applications accepted" signs. See *WestPac Electric*, 321 NLRB 1322 (1996) ("[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct); see also *Maramount Corp.*, 317 NLRB 1035, 1037 (1995) (the Board has broad discretion to fashion a "just remedy"). This affirmative relief is necessary because the Respondent's unfair labor practices affected primarily individuals who are not employees of the Respondent and who generally would not have access to notices posted inside the Respondent's facility or at the Respondent's jobsites. Similarly, mailed notice to persons affected is not practicable since the potential applicants who were turned away under the Respondent's unlawful "no applications accepted" policy generally were not identified. Therefore, I will recommend that the Respondent be required to post, and maintain for a period of 60 days following the Board's Order, three signs containing the following excerpt from the proposed notice marked "Appendix": "WE WILL ACCEPT APPLICATIONS FOR

[17] The recommended Order in this case does not supersede or in any way limit the Respondent's obligations under the prior decision. See *Norman King Electric*, 324 NLRB at 1078–1079. The Respondent's obligations under the recommended order in this case are in addition to any created by the prior decision.

EMPLOYMENT, CONSIDER SUCH APPLICATIONS, AND HIRE APPLICANTS WITHOUT REGARD TO THE APPLICANT'S UNION MEMBERSHIP OR SYMPATHIES." I will recommend that the Respondent be ordered to post these notices at each of the three locations at, and around, the Respondent's facility where the "no applications accepted" signs were previously posted, using lettering of the same size, type, and color as appeared on the "no applications accepted" signs. See Respondent's Exhibits 6 and 7. In addition, I will recommend that the Respondent be ordered to publish, in a newspaper of general distribution in the Owensboro, Kentucky area, a copy of the entire notice marked "Appendix."

The public notice is justified not only because posting inside the Respondent's premises and at the Respondent's jobsites is inadequate to reach the persons affected by the unlawful conduct, but also because of the Respondent's recidivism. As noted, the Respondent has previously been found to have violated the Act by screening union sympathizers from its applicant pool, and the evidence in this case shows that the Respondent has continued to screen union sympathizers despite the prior order directing it to stop. Moreover, as of the time of trial in this case, the Respondent had not offered employment to a single one of the discriminatees in the prior case, despite the fact that the Sixth Circuit had, over a year earlier, enforced the Board's order specifically requiring such relief. The Respondent's recalcitrance and recidivism have excluded union sympathizers from its workforce and, even if the Respondent's unlawful conduct ended today, that exclusion might well be self-perpetuating if union sympathizers in the public have to rely on current employees to find out about the changes in hiring policy required under the proposed Order in this case. The Board has ordered newspaper publication of the notice where, as here, publication is necessary due to such factors as the insufficiency of standard posting and the Respondent's proclivity to violate the Act. See, e.g., *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996); *Wackenhut Corp.*, 287 NLRB 374, 377 (1987); *Montfort of Colorado*, 284 NLRB 1429, 1479 (1987); *Roofers Local 30 (Kitson Bros., Inc.),* 228 NLRB 652 (1977); *Union Nacional de Trabajadores*, 219 NLRB 862 (1975); enfd. 540 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 1039 (1977). I recommend that the Board order such publication here.

[Recommended Order omitted from publication.]